



## ISLAMIC COURT'S APPROACH TO LAND DISPUTE IN INHERITANCE CASES

*Lego Karjoko, Abdul Kadir Jaelani, Hilaire Tegnán, Henning Glaser,  
and Muhammad Jihadul Hayat*

**Abstrak:** Penelitian ini mengkaji bagaimana pertimbangan hukum hakim dalam memutus perkara sengketa hibah tanah di Pengadilan Agama Selong, Nusa Tenggara Barat. Data pada penelitian ini diperoleh dari wawancara dan analisis putusan. Penelitian ini menunjukkan bahwa kebiasaan masyarakat menghibahkan harta sebelum kematian pewaris cenderung menjadi pemicu sengketa tanah berbasis waris di kemudian hari. Sengketa biasanya muncul dari pembagian tanah yang hanya kepada sebagian ahli waris dan merugikan sebagian ahli waris yang lain, terutama bagi anak perempuan dan keturunannya. Dalam memutus sengketa hibah tanah dalam kewarisan, hakim selalu mempertimbangkan keabsahan hukum hibah tanah dalam kasus yang diajukan. Selain itu, hakim juga menggunakan ayat-ayat al-Qur'an, hadis, pendapat ulama, dan kaidah fikih sebagai pertimbangan hukumnya.

**Kata kunci:** sengketa hibah tanah; perkara waris; Pengadilan Agama Selong; pertimbangan hukum hakim

**Abstract:** This study examines the legal considerations in settling inheritance disputes involving land distribution in Selong Religious (Islamic) Court of West Nusa Tenggara. The data in this study were obtained from interviews and court decision analysis. This study shows that the practice of granting property before the death of the *muwāriṭh* (testator) can cause inheritance-based land disputes in the future. Disputes usually arose when the land was distributed only to particular heirs, neglecting the others, especially the daughters and their descendants. In deciding the land disputes in inheritance cases, judges evermore considered the legal validity of the land distribution. Besides that, the judges use Islamic legal sources such as the Quran, Hadith, opinions of scholars, and *fiqh* in their legal considerations. However, the use of these multiple references does not necessarily lead to a diverse outcomes.

**Keywords:** land dispute; inheritance; Selong Religious Court; judge legal consideration

## Introduction

Conflicts over land are often found in inheritance distribution. In general, land disputes involve various parties, for example, a tenure conflict involving the government and indigenous peoples; agrarian conflicts between companies and indigenous peoples; or agrarian conflicts between communities/individuals and other individuals. Among the examples of the agrarian conflicts are: (1) the case of the land dispute between the indigenous community and PT Barat Selatan Makmur Investindo (BSMI) in Mesuji, Lampung Regency, (2) the agrarian dispute in the gold mining sector between the Pape community and PT Sumber Mineral Nusantara (SMN) in Bima, West Nusa Tenggara Province, and (3) agrarian disputes between residents of Simalingkar Village and Sei Mencharim Village, Deli Serdang Regency, North Sumatra Province against PT Perkebunan Nusantara II. These conflicts are significant, involving a group of people against the company's legal entity (Tegnan, 2015).

This study focuses on the land conflicts that occur in a more parochial sector: between individuals against individuals or families against families. Land dispute is contrary to the principle of legal construction in Indonesia, namely the ideology of social empowerment. This means that the distribution of land within the family should not cause the family to rift (Karjoko et al., 2019). These family-based land disputes are found in the General and Religious Courts. In the General Courts, land disputes are submitted by people bound by general civil law. In contrast, land disputes in the Religious Courts are disputes submitted by Muslims or people who submit to Islamic law (Wahyudi, 1967). Land disputes in the Religious Courts are land disputes—where the legal institutions are entrenched in inheritance disputes. Essentially, this inheritance case is mainly a land claim.

In an agricultural society's culture, the land is the main asset that sustains life. The lack of above-ground creates a severe problem. This problem needs to be resolved as quickly and efficiently as possible. Therefore, litigants usually assess which process to use. This assessment is rationally affiliated with their understanding of economic justice, religious law-based justice, and local customs. As one of the institutions of law and justice amid society, the Religious Courts is a comprehensive institution. The Religious Courts accommodate those who feel that the old tradition violates their rights. The Religious Courts represent the state as the institution authorized to deliver legal certainty, justice, and

even the benefits of contested land ownership in inheritance disputes. The Religious Courts also apply Islamic law, binding the majority of the Muslim community. The people's desire to realize economic will, legal certainty, justice, and religious guidance, puts the Religious Courts a strategic choice among other institutions. Therefore, family-based inheritance land disputes are frequently brought to the Religious Courts. However, this is inseparable from the norms of the law regarding the Religious Courts' absolute competence (Mustika & Dastina, 2020).

The competence of the Religious Courts in inheritance experienced ups and downs until Law no. 7 of 1989 concerning Religious Courts. The emergence of the law does not necessarily end the polemic among inheritance law experts because the law still leaves options for parties to choose litigation or non-litigation methods. After the emergence of Law no. 3 of 2006 concerning Amendments to Law no. 7 of 1989, such options were abolished. Law no. 3 of 2006 confirms that inheritance cases involving Muslims are the absolute authority of the Religious Courts. Since then, the Religious Courts have experienced expansion and affirmation of authority. This allows the Religious Courts to handle more cases than before, especially inheritance cases (Manik et al., 2017).

Departing from the Religious Courts' opportunity to resolve land ownership disputes based on inheritance law, the Religious Courts often face land conflicts between families. In carrying out their functions, the Religious Courts are generally dominated by marital cases, while inheritance cases are relatively rare. This is certainly not in tune with the abolition of option right in Law no. 3 of 2006 that the case of inheritance of Indonesian Muslims has become the full authority of the Religious Courts. The Selong Religious Court showed different conditions; apart from marriage cases, there were also inheritance cases. According to statistical data published at Perkara.NET, the Selong Religious Court handles the highest number of inheritance cases compared to other Religious Courts under the Mataram Religious High Court jurisdiction. Until October 2014, Selong Religious Court had received 43 inheritance cases. In 2012 and 2013, Selong Religious Court received as many as 87 and 91 cases, respectively. Unlike the Mataram Religious Court, which only handled 9 cases in 2014, 17 cases in 2013, and the Praya Religious Court handled 41 cases in 2014 and 56 cases in 2013. In the accumulation of these three years, Selong Religious Court handled 241

inheritance cases. In 2012, the number of inheritance cases handled by Selong Religious Court was 87 cases, with a composition of 80 contentious cases and seven voluntary cases. In 2013, there were 86 contentious cases and five voluntary cases. In 2014, there were 40 contentious cases and three voluntary cases. These inheritance matters are conflicts over land distribution in one family clump.

The number of cases mentioned above is enthralling because it cannot be separated from the land distribution trend in the community. Among the crucial factors is the number of inheritance distributions when the heir is still alive. This fact collides with the socio-religious condition of a homogeneous Muslim community. This condition implies a dilemma. On the one hand, the community is first faced with the inheritance distribution tradition using old customs. The distribution of which is considered not contrary to Islamic law. On the other hand, there is a passion for implementing new laws that are more accommodative to the economic motives of the parties who feel disadvantaged by the old law.

This paper will discuss land hibah disputes in the Religious Courts. These courts show a more pluralistic side than those in the General Courts. The Religious Courts consider and apply positive (national) law, Islamic law, and even customary law. The legal decisions of the Religious Courts represent more varied legal standards. An illustration is what is called by Bowen as 'dual validity', a term to mention that, at the same time, the Religious Court applies a law (The Compilation of Islamic Law) which considers double standard, particularly in validating marriage (Bowen 2001; Nurlaelawati, & Salim 2013). The use of dual validity at some points as a play to preserve the view of classical Muslim scholars behind the registration process. It means that in the case of marriage, its validity is not seen from the administrative side only, but also more substantial to requirements defined by religion (Nurlaelawati & Salim, 2013). This is different from the General Court, which only applies positive law with the addition of customary law. This is not much different from sharia business disputes (Rosidah et al., 2017).

### **Re-actualization of Inheritance Law in Society: Old Law vs New Law**

The social system is open, continually undergoing a process of mutual exchange in the form of inputs and outputs with the environment. The law emphasizes its function of regularly resolving conflicts that arise in

society. When a dispute arises in the community, it signifies that action is needed to resolve the dispute. Leaving these disputes unresolved will hinder the creation of productive cooperation in society. At that time, a mechanism is needed to integrate the forces in society so that a productive cooperation process can be created or restored (Rahardjo, 2009).

Law in its interaction with other subsystems in society is dynamic. Law is seen as an integrated logic system, free from contradictions and viewed from an empirical perspective (Weber, 1978; Rahardjo, 2009). Yahya Harahap explained that there had been significant changes in the development of customary law in Indonesia, for example, in the field of inheritance law (Harahap, 1988). On November 1, 1961, there was a fundamental breakthrough with the issuance of the decision of the Supreme Court in case no. 179K/Sip/1961 known as the New Customary Inheritance Law. In his consideration, it is clearly stated (Harahap, 1988; Saimima et al., 1988): 1) Sons and daughters have the same rights and position on the inheritance of their parents; 2) with the same rights and status, the share of boys and girls is equal; 3) such values, not only based on a sense of humanity and general justice; 4) but it is also based on legal awareness that exists throughout Indonesia.

With this decision, a new customary inheritance law was born, which has the core of proffering equal rights and shares for boys and girls. This decision is considered a step further than the old and pure customary law values. According to the pure old customary inheritance law, in some regions and tribes that adhere to a unilateral lineage with a patrilineal system, daughters do not have the right and position to inherit their parents' inheritance. Thus since 1961, the values of customary inheritance law are no longer purely and consequently applied. Courts in the general judiciary have made the new customary law of inheritance the basis for resolving disputes over the distribution of inheritance since 1961 (Harahap, 1988).

According to Harahap, the new customary law of inheritance creates jurisdictional confusion. The resulting impact stimulates justice seekers to confuse the jurisdiction of general courts with religious courts. (Harahap, 1988) This fervor becomes even more evident when linked to Government Regulations No. 45 of 1957 and Law no. 7 of 1989 concerning the Religious Courts, which does not explicitly state that the inheritance of Muslims is the absolute competence of the Religious Court. In Article 4 paragraphs (1) and (2), Government Regulations No.

45 of 1957—promulgated on October 9, 1957—stated that:

- 1) The Religious Courts/Syar'iah Courts examine and decide disputes between husband and wife who are Muslim. All cases according to living law are decided according to Islamic religious law relating to marriage, *ṭalāq*, *ruju'*, *fasakh*, *nafaqah*, dowry, residence (*maskan*), mut'ah and *hadānah*, inheritance-mal-inheritance cases, *waqf*, grants, *ṣadaqah*, *bayt al-māl* and others related to it, as well as for deciding on divorce cases and ratifying that the terms *ta'liq* has taken place.
- 2) The Religious Courts/Syariah Courts have no right to examine the cases referred to in paragraph (1) if other matters apply to the case other than Islamic law.

According to Yahya Harahap, the formulation of this provision does not explicitly lay down the specific authority of the religious court to adjudicate inheritance disputes for Muslims. Its jurisdiction hangs on a vague formula, as long as it is a living legal awareness. (Harahap, 1988) Law no. 7 of 1989 concerning the Religious Courts still leaves the problem of freedom of choice of the forum until amended by Law no. 3 of 2006.

The jurisdiction in question is that, in general, women will submit inheritance disputes to the general court because the general court will apply the value of customary inheritance law, which will give equal shares between sons and daughters. On the other hand, men will submit inheritance disputes to the religious court with the motivation that the religious court will apply the values of *fara'id* provisions, guaranteeing that they get twice the share of women. The consequences of the problems above indicate that profit motivation factors always dominate inheritance disputes. The motivation of the Islamic attitude almost does not reverberate.

The link between law and economics in the above context shows that law constantly interacts with other subsystems. The link between law and economics will appear in the context of empirical reading, for example, the behavior of humans based on economic considerations. Someone's actions appear to be legal acts because the act is per the required legal procedures, so it is not necessarily someone who obeys the law on the motive of obeying the law (Weber, 1978; Rahardjo, 2009).

According to Rajagukguk in 2009, there are three legal systems in Lombok (Rajagukguk, n.d.). First, the Sasak customary law is

characterized by patrilineal in which women do not inherit from their parents, for example, in the Sade area of Central Lombok. The Sasak people of Sade Village adhere to a patrilineal system, drawn from the male or father side. A daughter is considered to leave her family and move into her husband's family because she follows her husband after marriage. Second, Islamic law, namely the distribution of inheritance based on the provisions that men get twice the share of women. Islamic law exists, especially in the eastern part of Lombok. This is implied the structure of society, which is almost entirely Muslim, and many Islamic religious educators come from East Lombok. Third, the law is applied by the general court. What is interesting in Rajagukguk's presentation is that the Selong General Court cancelled the grant and divided the inheritance in a ratio of two to one. According to Sasak Customary Law, this division occurred in Baiq Fadlah et al., v. Baiq Saeah stated that the Plaintiff and the defendant as daughters have the right to inherit by getting half a share. On the other hand, the Selong General Court decided equally between men and women. This is contained in the Selong District Court Decision dated 27 December 1982, No. 164/P.N.Sel/1982/Pdt between Inaq Sanah et al. v. Kadirun et al. (1982) (Rajagukguk, n.d.).

To support its legal argument, the General Court also cited the research article "Development of the Sasak Tribe Customary Law" conducted by the Faculty of Law, the University of Mataram, in 1979. Since 1951 in Lombok, especially in the Masbagik sub-district (part of East Lombok Regency), there has been a shift in Customary Inheritance Law, especially regarding the daughter's position. If according to the old customary law, daughters are not heirs and are not entitled to inherit immovable property such as land, now in its development, it has been recognized that women are heirs and have the right to inherit any assets from their parents together with siblings—the boy (Rajagukguk, n.d.).

### **Socio-Religious Portraits of East Lombok People**

The population of East Lombok Regency based on the results of the 2020 Population Census conducted by the Central Statistics Agency (BPS) is 1.325.240 people, with details of 659.517 males and 665.723 females. Then the sex ratio is 99, meaning that for every 100 women, there are 99 men. This illustration shows that the female population



is more than the male population. The majority of the people of East Lombok work as farmers. Food crops in the East Lombok Regency area with development potential are rice plants that are the main crops, corn, cassava/sweet potato, which develops in the Aikmel, Terara, Suela, and Pringgabaya sub-districts. The development of horticultural crops in East Lombok Regency in the form of vegetables with development potential is in the Sembalun sub-district, a commodity-producing area of garlic/red, carrots, cabbage, tomatoes, potatoes, and others. Most of the potential human resources in East Lombok Regency have expertise in agriculture, and some have natural skills to make sculptures but in limited quantities. Thus, it can be said that the community tends to do farming activities (Badan Pusat Statistik Kabupaten Lombok Timur, 2021).

The people of East Lombok are predominantly Muslims. The total population of Muslims in 2020 was 1.315.206 people, or about 99.9 percent. They live side by side with 160 Protestants; 81 Catholics; 718 Hindu people; and 20 Buddhist people. Judging from the availability of worship facilities, East Lombok Regency is known as an island with thousands of mosques. For example, in 2020, there were 1.392 mosques and 4.044 *mushalla* [public building for praying, smaller than mosque]. (Badan Pusat Statistik Kabupaten Lombok Timur, 2021). The majority of Muslims were members of Nadlatul Wathan, the dominant Islamic mass organization in East Lombok. This organization is engaged in da'wah (proselytization) and Islamic education. For example, there are two higher education institutions in the religious field under Nahdlatul Wathan, namely the Hamzanwadi Islamic Institute in Pancor and the Hamzanwadi Islamic Institute in Anjani. In addition, Nahdlatul Wathan also has Islamic boarding schools at multi-levels.

### **General View on Land Distribution in East Lombok**

The people of East Lombok, in general, do not recognize the separation of assets in the family. After marriage, the husband and wife's assets are owned by each other. These assets are used jointly. In general, most men own land as a gift from their parents to suffice their families' needs, while women only bring home welfares that are light and easy to move. The land a man brings is usually a temporary gift from his parents or part of the inheritance after the death of the parents. The assets obtained before and after the marriage become joint property. If one

dies, the property is controlled by the surviving party. If the woman dies first, the man usually controls the property to benefit his children. The distribution will usually be done quickly if the man dies first, especially when the children are already married.

Regarding inherited property, the people of East Lombok do not have a particular term. The often discussed assets are farmland, gardens, yards, and houses. This is indeed inseparable from the fact that the majority of the people work as farmers. The form of inheritance in question is limited to land. As for the share of each heir, it depends on the results of family deliberated consensus. The heirs known in the East Lombok community are limited to children. The relatives will only control the land if the *muwāriṭh* do not have children. Boys get a more favorable position than girls. When the *muwāriṭh* are still alive, their property in the form of land will be distributed to their married sons. The daughters do not obtain the share as they follow their husbands.

Giving property while the heir is still alive is not a division of inheritance but rather a temporary division of labor. In reality, the assets distributed before the *muwāriṭh* die are often considered inherited assets and later become triggers for prolonged conflicts. For families who do not have biological children and only have adopted children, all the inheritance will be controlled by the adopted child. If the *muwāriṭh* do not have children, the property owned falls to his family, especially his father or brothers. When a man dies, a woman returns to her family.

Long before Islam spread, Lombok was ruled by the Balinese. Balinese imperialism through the Karangasem kingdom centered in Mayura Cakra Negara adheres to Hinduism. According to Hindu inheritance law, the inheritance goes to men. Physically, Balinese heritage is not very much found in East Lombok, but culturally, especially inheritance law, is powerful. The existence of inheritance is always based on the existence of relationships, both blood relations (*naṣab*) and marital relations. Especially for kinship-based legal relationships or genealogical relationships, it is necessary to designate various articles of Hindu law that strengthen the basis of the family system (Gede Pudja, 1977).

According to Gede Pudja, Hindu jurists believe there are two interpretations regarding inheritance distribution, namely, the distribution of inheritance can only be done after the parents die. The distribution

of inheritance can be done while the parents are still alive. When the heir is still alive, the distribution is not absolute but is formal. This system was developed by one of the schools of Hindu law called the Dayabhaga. This sect is influential in Indonesia, and its legal practice is evident in the Hindu community in Bali and Lombok (Gede Pudja, 1977). The high number of inheritance cases at the Selong Religious Court is not an independent variable but depends on the community's level of development and legal awareness, including the weakening of traditional culture and the strengthening of modern culture. The high number of new inheritance cases is logical if it is explained from the changes in the structure of society before Islam came until Islam had full power. Under the rule of the Karangasem kingdom, the Hindu community implemented an inheritance law that only gave a share of inheritance to sons. Girls only get severance pay in the form of rice at the time of rice harvest. Until Islam came to Lombok and slowly opened the inheritance for women. The climax was when the law on religious courts was enacted, which became a tap for litigants.

Concerning the issue of inheritance, one of the popular customs in the people of East Lombok is to give several plots of land farm, fields, or gardens to their married sons to meet the needs of their family. This is a common practice in the context of the structure of the farming community in Lombok. In contrast to women, they are not given like sons when they are married because they follow their husbands. This process has been going on for so long from generation to generation that it has become a habit for the people of East Lombok. There will be no dispute as long as women do not feel disadvantaged.

This condition was justified in previous studies as a practice of inheritance distribution when the heir was still alive—for example, Murdan and Jayak's research in Landah Village and Jago Village, Central Lombok Regency. East Lombok Regency is almost entirely Muslim and is known as a thousand mosques, so that the point of view used is Islamic Inheritance Law. One of the pillars of inheritance is muwarrits, both intrinsically and legally dead (Rahman, 1988).

The inheritance functions as a replacement of property ownership from the passed person to the ones left behind (Rahman, 1988). This understanding is inapplicable if the person to be replaced is still alive and has total power over the property; or the person who will

replace the ownership is intangible when the replacement occurs. An inheritance distribution will be considered valid by the people of East Lombok if it involves the village head and is witnessed by the hamlet head, family, and community leaders in the village. This inheritance distribution is carried out after the testator dies. It should be noted that the intended heir is a man or a father. If the woman or the mother dies first, the inheritance will not be divided and remain in the father's hands. This means that inheritance is only opened if the deceased is a man. This seems no different from the shift in Donggo customs and traditions as a dialectical process with Islamic law (Mutawali, 2012).

### **Litigants' Reasoning in Land Hibah Dispute at Selong Religious Court**

A case before the Court must be built on a reason that the parties have rationally conceived. The reasons used by these litigants are legal arguments presented in court. This legal argument reflects how people perceive the law. It also mirrors the dynamics of the community's legal understanding in maintaining their economic resources. Thus, delving into these arguments reveals a view of how land and wealth are distributed among (Muslim) society. It encapsulates legal nuances from the people's perspective. A Plaintiff is supposed to present facts that back up his argument, and a Defendant presents counter facts that support his defence. These facts are assembled according to the standard of procedural law applied by the Court.

### **Plaintiff Arguments: No Legal and Fair Share**

A conflict or dispute is submitted to the court based on the occurring fact. This fact is explained in the lawsuit in the *fundamentum petendi* (ground of claim) section. In the *fundamentum petendi* or *posita* (means of the claim), there are concrete arguments about the existence of a legal relationship which is the basis for a lawsuit. *Posita* is divided into two parts, namely *feitelijke gronden* (factual ground) and *rechtelijke gronden* (legal ground). *Feitelijke gronden* explains the events or events that occurred or the case, and *rechtelijke gronden* is the juridical basis of the claim. *Posita* will be weighed by the panel of judges in the preamble of the decision so that the truth can be verified.

One of the popular arguments used by the plaintiffs to file their lawsuits is that there has not been a legal and fair distribution of

inheritance. According to one of the judges interviewed, there are at least two reasons that most often become the basis for the inheritance conflict at the Selong Religious Court: the distribution of inheritance has not been carried out and the distribution of inheritance inappropriately or unlawfully. The authors have carefully examined several cases showing that the pattern of unilateral possession of inheritance has caused the aggrieved party to file a claim. For example, in case number 0614/Pdt.G/2013/PA.Sel between Muhli alias Amaq Anto et al., and Asrudin alias Amaq Eli, et al. In point 4 of the case, the Plaintiff submitted the argument stating:

Whereas in the opinion of the Plaintiff, the object of a dispute as referred to in points 2 letters a and b above is the inheritance of the heir, namely the late Samsiah Alias Amaq Nursamat, which has never been divided by inheritance and must be divided equally by the heirs who are entitled according to the share that should be accepted based on the applicable legal rules, namely based on Islamic Law [fara'id];

The defendant in the exception did not deny that the inheritance had not been divided but said that the property had been granted to the Plaintiff and submitted evidence T.1 in the form of a photocopy of the statement of grant/grant, dated January 30, 1993, stamped following the original. The argument is said:

That it is true that the object of the dispute has not yet been divided into inheritance but has been granted by the heir to the sons and grandsons of the sons before he dies, with the following distribution;

In their consideration, after examining the relevant evidence from both the Plaintiff and the defendant and the testimony of witnesses under oath, the panel of judges considers it a permanent argument and or it has been proven that the assets have not been divided by inheritance. Then at decision point 4 of the Majelis, the judge determined that the late Samsiah alias Amaq Nursamat left an undivided inheritance to the heirs and his successor heirs.

Case number 0511/Pdt.G/2013/PA.Sel between Inaq Mariyun et al., and Sahar, et al. In points 7 and 10 of the posita of this case, it is argued that the inheritance of the object in dispute has not been divided into inheritance. In both the exception and the main case, the defendant denied it with the argument that the object in dispute was not the heir's inheritance but a gift from another party to his grandfather. Plaintiff can prove that the object of the dispute is the inheritance left by the testator.

In contrast, the defendant was unable to prove his objection. The panel of judges in their decision confirmed the arguments of the Plaintiff's claim and determined the share of the heirs.

In case number 0578/Pdt.G/2013/PA.Sel in *posita* 5 and *petitum* 9, the Plaintiff states that the assets that are the object of the dispute have not been divided by inheritance and requests the court to divide the inheritance of the assets to the rightful heirs. The defendant, Plaintiff's uncle, and aunt confirmed that the object of the dispute had not been divided into inheritance. Some of the other defendants denied that the ownership of the object of the dispute was addressed to him based on the legal right of the sale and purchased with the Plaintiff's uncle and aunt (some of the other defendants). The judge, in his decision, confirmed that the object of the dispute had not been divided by inheritance and determined the share of heirs with the provisions of 2:1. The party who is proven to have good intentions buys part of the inheritance when controlled by some of the defendants and is recognized by the defendant (Plaintiff's uncle and aunt), whose interests are protected by the judge.

Sharia inheritance law aims to create order in transferring property of people who have died. The property left by the person who dies automatically becomes the right of the heirs left behind under the provisions stipulated by Islamic law. This principle is known as the *ijbārī* principle. Therefore, inheritance in Islam is defined as "transfer of property," not "transferring of property." Transfer means switching automatically, while transferring means switching through someone's efforts (Syarifuddin, 2015). Consequently, if a property is controlled or owned through a person's business (legal actions), the control or ownership cannot be categorized as an inheritance. For example, grants, wills, buying and selling, pawning, alms, and other legal actions cannot be qualified as part of inheritance law.

The element of *ijbārī* in terms of quantity can be understood from the word *mafrūdan*, which means it has been determined or calculated. Terminologically means something that has been required of Allah to his servants. It means something that has been determined in amount and must be done in a binding and coercive way. From this understanding, all the practice of transferring assets in society by violating the rules for the number of parts that have been determined in Islamic law cannot be called Islamic inheritance. The element of *ijbārī* in terms of the transferee means that all heirs entitled to the inheritance have

been determined with certainty. The consequence is that all inheritance distribution practices in the community that does not give a share of the inheritance to the rightful heirs or the inheritance are carried out by excluding some heirs who should receive it, deviating from the provisions of the Islamic inheritance. An inheritance will only be valid if given to all heirs who have rights, both male and female. There is no justification for monopoly control in Islamic inheritance if there is more than one heir. These rights must be divided according to the share of each heir. If the right is not distributed or controlled by one of the parties, it will cause losses for the party that does not control it.

The control and determination of heirs unilaterally are not practiced under Islamic inheritance rules. Any practice of control or ownership of property that is considered a result of inheritance, but deviates from the principles above, can be said not to meet the provisions of applicable Islamic law so that the religious court has a loophole to cancel the practice. Of the sixteen decisions that have been carefully compiled, there is only one case proving that inheritance distribution has been carried out by the panel of judges, namely the case in decision number 250/Pdt.G/2013/PA.Sel. In this case, the judge decided to reject Plaintiff's claim to redistribute the inheritance and, on the contrary, to strengthen the previous settlement. In addition to considering Plaintiff's confession about having done so for the inheritance amicably, the judge seems to have also noticed that the parties' share has approached a proportional share. In this case, the Plaintiff as a daughter gets 2,700 m<sup>2</sup>, T1 as a son gets 4,950 m<sup>2</sup>, and the substitute heirs' grandchildren get 3,500 m<sup>2</sup>.

### **Defendant Counter-Argument: Grants Distributed while the Heirs are Alive**

Grants are the basis for controlling assets, often the object of dispute in many inheritance cases at the Selong Religious Court. Grants in the property distribution system in East Lombok are often a trigger for conflict. The actions of the heir in the distribution of assets while still alive often ignore the bilateral principle of Islamic inheritance, which results in the loss of one party, namely the woman. Other heirs often neglect the share of women in the distribution of these grants. Even grants are often used as a way to control more inheritance by some heirs to other heirs. As long as the heir is still alive, the harmed heir cannot

fight back, because in general, his action will be considered a despicable act contrary to the social conditions at that time. Psychologically, in most people, among the behavioral guidelines are customs. The custom was taken for granted without further consideration (Gerungan, 2010; Jandra, 2006). Therefore, community action prefers to follow the existing path in any case.

After the property is controlled, then part or all of it is sold to a third party without considering the other heirs, so that in an open opportunity, the heirs who feel that their rights have been harmed/violated shall file a claim. This pattern of distribution and control is often the reason for a lawsuit at the Selong Religious Court. The validity of the grant following shari'ah or statutory provisions is measured based on three benchmarks, namely whether the grant is carried out in good faith, whether the grant is in line with the spirit of Islamic shari'ah and whether the grant does not conflict with legal regulations and or legislation.

The decision of the Selong Religious Court, which cancelled the grant, can be seen in three decisions: (1) decision number 0614/Pdt.G/2013/PA.Sel; (2) decision number 211/Pdt.G/2013/PA.Sel; and decision number 510/Pdt.G/2013/PA.Sel. In the preamble, it is stated that the heir's grant for all his assets which is intended for some of his children so that there is nothing left for the other heirs, is classified as a grant made with the aim that the heir's assets do not fall to other heirs ) or to avoid the distribution of inheritance by *farā'id* to the heirs. Moreover, in the hearing, it was not proven that there was agreement from the other heirs, then such a grant was decided not to be carried out in good faith. In assessing the above case, the panel of judges also stated that the grant made by the heir was not in line with the provisions or spirit of Islamic law. Some of the arguments cited include An-Nisā' 2:135 and some hadith.

The other arguments used by the judges are articles 210 and 211 of the Compilation of Islamic Law and Article 921 in addition to Article 1086 of the Civil Code. In essence, it explains that the maximum portion of the grant is one-third of the total inheritance. The grant in the distribution of inheritance is included in the part of the inheritance, namely the grant is also calculated as part of the assets. Either the grant is made before or after the Islamic Law Compilation is promulgated. The reasons stated above are the reasons postulated in the lawsuit. The reasons are examined, and the truth is decided by



the panel of judges and outlined in a decision so that textually these reasons can be traced in the judges' decisions. The high inheritance case in the Selong Religious Court is inseparable from the accumulation of various factors. These factors include the opportunity to apply laws that are more in line with justice, the influence of the proliferation of religious courts both institutionally and in authority, especially in the field of inheritance, which later makes it easier for the community to access justice, and the subordinate role of other social institutions in seeking mediation.

### **Judges Legal Considerations**

One of the characteristics of modern justice is the use of a systematic legal system, in terms of bureaucratic-administrative institutions, legal processes (first-level examinations to execution of final-level decisions), and judges' referrals in determining or deciding a case. The modernization of the religious court institution can be proven from the bureaucratic position of the Religious Court and its position according to the legal basis. In terms of bureaucracy, it can be seen from the transfer of the position of the religious court from the Ministry of Religion to the Supreme Court. According to the legal basis, it can be seen from the alignment of the courts within the religious courts with the other three courts, as stated in Article 24 of the 1945 Constitution. The dynamics of regulations on religious courts, for example, Law no. 7 of 1989 refined by Law no. 3 of 2006 and further refined by Law no. 50 of 2009 represent a serious reform effort.

The Religious Courts apply the same law as in the general courts in terms of procedural law, except for specific matters. This can be seen in the unification and codification of Islamic law materials into national law, through national legislation programs, such as Law no. 41 of 2004 concerning waqf, Law no. 23 of 2011 concerning the management of zakat, Law no. 21 of 2008 concerning Islamic banking and various other regulations that support the improvement of religious courts. See Article 54 of Law No. 7 of 1989 concerning Religious Courts.

The objectives of improving the courts above are to encourage the productivity of religious courts in realizing justice and legal certainty. Justice and certainty are only obtained after the judge decides on the case being tried and produces a legal product called a court decision.

The judge must not arbitrarily refer to various irrelevant sources in formulating a decision. In other words, judges are encouraged to base their decisions on laws that have standardized justice to be accounted for under the purpose of unification. In deciding a case, the judge is bound by Article 60A of Law no. 50 of 2009, which reads:

- 1) In examining and deciding cases, judges must be responsible for the decisions and decisions they make.
- 2) The stipulation and decision referred to in paragraph (1) must contain the judge's legal considerations based on the right and correct reasons and the legal basis.

In addition, in handling a case, the judge must explore, follow and understand the legal values and sense of justice in society. Based on the mandate of the Judicial Law, the Selong Religious Court must carry out its judicial function with the obligation to explore the values or sense of justice that exist in the Selong community so that the judge's decision follows the sense of justice in society. To explore the sense of justice in the Selong community, at least the judge must look at several things, namely the religious condition of the community, the condition of customs and traditions, and the opportunity to apply national law to answer the demands of the community. To realize this, it is not impossible for judges to have various considerations and references in realizing justice for the Selong community. For this reason, the authors present the basis used by the Selong Religious Court Judge in resolving the inheritance case under study.

Table 1. Legal Source of Judges in Deciding Cases

No.	Decisions	Legal Source			
		Al-Qur'an	Compilation of Islamic Law (KHI)	<i>Fiqh</i> Book	etc.
1	177/Pdt.G/2013/PA.Sel	√	√		√
2	250/Pdt.G/2013/PA.Sel				
3	510/Pdt.G/2013/PA.Sel		√		√
4	410/Pdt.G/2013/PA.Sel	√	√		
5	806/Pdt.G/2012/PA.Sel	√	√		
6	532/Pdt.G/2012/PA.Sel	√	√		
7	614/Pdt.G/2013/PA.Sel	√	√	√	√

8	211/Pdt.G/2013/PA.Sel	√	√	√	√
9	578/Pdt.G/2013/PA.Sel	√	√		
10	349/Pdt.G/2009/PA.Sel	√	√		√
11	393/Pdt.G/2013/PA.Sel	√	√		
12	511/Pdt.G/2013/PA.Sel	√	√		
13	877/Pdt.G/2013/PA.Sel		√		√
14	320/Pdt.G/2013/PA.Sel	√			
15	269/Pdt.G/2013/PA.Sel	√	√		
16	246/Pdt.G/2010/PA.Sel	√	√		

The table above shows the variation of judges' references in deciding inheritance cases. Of the 16 cases, 14 cases were decided by citing the provisions of the Islamic Law Compilation, 13 cases were decided by citing the Qur'an, 2 cases were decided by citing fiqh books, and 6 cases were citing the Civil Code and Law no. 1 of 1974. The table above shows that only two cases did not base their decisions on the Compilation of Islamic Law, and as many as 14 cases were decided without referring to the fiqh book. The specification of articles or references used by judges can be seen in the following table.

Tabel 2. Legal Basis for Judges in Deciding Cases

No	Decision	Legal Basis and Reference
1	177/Pdt.G/2013/PA.Sel	Civil Code Article 1320; an-'Nisā' verse 11; KHI Article 176.
2	250/Pdt.G/2013/PA.Sel	-
3	510/Pdt.G/2013/PA.Sel	KHI Article 210; Hadīth Thabrāni; KHI Articles 211-212.
4	410/Pdt.G/2013/PA.Sel	an-'Nisā' verse 11; KHI Article 176.
5	806/Pdt.G/2012/PA.Sel	KHI Articles 176 and 179; an-'Nisā' verse 11.
6	532/Pdt.G/2012/PA.Sel	an-'Nisā' verses 11 and 12; KHI Articles 176, 180 and 185.
7	614/Pdt.G/2013/PA.Sel	an-'Nisā' verses 11 and 135; Hadīth Mālik, Hadīth Bukhārī and Bayhaqī, Hadīth Ibn 'Abbās; Wahbah al-Zuhaylī: Civil Code Articles 921 and 1086; KHI Articles 185, 210 and 211.
8	211/Pdt.G/2013/PA.Sel	an-'Nisā' verses 11 and 135; Hadīth Mālik, Hadīth Bukhārī and Bayhaqī, Hadīth ibn 'Abbās; Wahbah al-Zuhaylī: Civil Code Articles 921 and 1086; KHI Articles 185, 210 and 211.

9	578/Pdt.G/2013/PA.Sel	an-'Nisā' verse 11; KHI Articles 176, 180 and 185.
10	349/Pdt.G/2009/PA.Sel	Article 35 paragraph (1) Law No. 1974; an-'Nisā' verses 11 and 12; KHI Articles 176 and 180.
11	393/Pdt.G/2013/PA.Sel	an-'Nisā' verses 11 and 12; KHI Articles 180 and 176.
12	511/Pdt.G/2013/PA.Sel	an-'Nisā' verse s11 and 12; KHI Article 176 and 180.
13	877/Pdt.G/2013/PA.Sel	Pasal 35 paragraph (1) UU No. 1974; KHI Article 171 letter e.
14	320/Pdt.G/2013/PA.Sel.	an-'Nisā' verse 11.
15	269/Pdt.G/2013/PA.Sel	Article 176 KHI, an-'Nisā' verse 11.
16	246/Pdt.G/2010/PA.Sel	an-'Nisā' verses 11 and 12; KHI Articles 176 and 180.

Regarding the application of the Compilation of Islamic Law as a legal basis, in general, it can be seen in the two tables above. However, precisely the conditions of applying the Compilation of Islamic Law at the Selong Religious Court will be highlighted in several cases below. From the examination of the 16 decisions above, it is arguably to say that the differences in references substantially have no discernible impact on the outcome of the decisions. The cases discussed in the decisions above tend to be established inductively. Deductive legal reasoning occurs only after the facts have been proven. In this sense, fact means any pieces of evidence (certificate) (Sekotibo 2021). In making decisions, most of the judges' reasoning resonates the same pattern, namely putting The Compilation as the primary standard, except for the decision 320/Pdt.G/2013/PA.Sel and 250/Pdt.G/2013/PA.Sel. The decision number 320/Pdt.G/2013/PA.Sel is slightly different from other decisions because the judges in their consideration did not directly consider positive legal norms, both statutes, and the Compilation of Islamic Law.

The judge only quoted the meaning of an-'Nisā' 4:11, then determined the verdict. Instead of providing a legal argument, the judges in this decision only saw the evidence presented by the litigants. In this case, Defendant acknowledged most of the evidence submitted by Plaintiff. In this instance, the conflict is not complicated. The judges are hardly bothered to explore the case because the Defendants acknowledged the Plaintiffs' claim. This means that this case is relatively simple, less of complexity, compared to other cases. This case is simple, so the judge's legal reasoning is simple. The judge's simple legal considerations do not vary the outcome of the case (*amar putusan*).

A more astonishing fact is revealed in the case of 250/Pdt.G/2013/PA.Sel. In this case, the judges did not include any legal norms, statutes, the Compilation of Islamic Law, or legal considerations from the scripture. It does not include norms or sources of law at all. As recorded in the verdict, the judge's legal considerations only rely on the evidence submitted by Plaintiff.

### **Main Factors in Land Disputes: Women Demand Inheritance Rights**

In this subchapter, the problems or issues that underlie the parties to the dispute will be presented and the arguments put forward by the parties in each classified case. The presentation of the case will be followed by the results of the judge's decision on these arguments briefly. In general, all cases are seen and classified into five, namely: (1) based on the gender of the heirs who are the plaintiffs and defendants in the dispute; (2) inheritance cases are related to joint property; (3) a case containing an heir substitute; (4) cases containing mandatory will demands; and (5) cases containing polemics on grants against inheritance. The last four classifications are based on the reform of inheritance rules in the Compilation of Islamic Law. Cases that do not fall into the above categories will be presented at the end of this sub-chapter.

Of the sixteen decisions that have been reviewed, 12 of them can be classified in the first classification, namely girls versus boys. The second classification is two cases. The third classification is four cases. There is only one case of mandatory will classification and 3 cases relating to grants. These cases can be seen in the table below.

Table 3. Grouping of Decisions Based on Case Type

No	Decision	Plaintiff	Defendants	Classification				
				1	2	3	4	5
1	510/Pdt.G/2013/PA.Sel	Daughter	Son	√				√
2	410/Pdt.G/2013/PA.Sel	Daughter	Son	√				
3	806/Pdt.G/2012/PA.Sel	Daughter	Son	√				
4	532/Pdt.G/2012/PA.Sel	Daughter	Son	√				
5	211/Pdt.G/2013/PA.Sel	Daughter	Son	√		√		√
6	269/Pdt.G/2013/PA.Sel	Daughter	Son	√				

No	Decision	Plaintiff	Defendants	Classification				
				1	2	3	4	5
7	177/Pdt.G/2013/PA.Sel	Daughter	Son and Daughter	√				
8	250/Pdt.G/2013/PA.Sel	Daughter	Son and Daughter	√		√		
9	578/Pdt.G/2013/PA.Sel	Daughter	Son and Daughter	√		√		
10	320/Pdt.G/2013/PA.Sel.	Daughter	Son and Daughter	√				
11	614/Pdt.G/2013/PA.Sel	Daughter	Son and Daughter	√		√		√
12	511/Pdt.G/2013/PA.Sel	Daughter	Daughter	√				
13	349/Pdt.G/2009/PA.Sel	Second wife	Descendant from first wife			√		
14	877/Pdt.G/2013/PA.Sel	Third wife and adopted son	Sixth wife			√		√
15	393/Pdt.G/2013/PA.Sel	Descendant from first wife	Descendant from second wife					
16	246/Pdt.G/2010/PA.Sel	Daughter	Third party					

The daughters referred to in this section are not limited to daughters as direct heirs but also daughters as intermediaries/connectors for grandchildren. The grandchildren referred to are either male or female, which is important to be connected through daughters. Likewise, what is meant by sons is not limited to direct sons but also sons as liaisons for grandchildren. In general, from the twelve classified decisions, two facts were found, namely: (1) in the plaintiff's position, girls always exist, while boys do not necessarily exist. If there are boys, then only in a state of coalition with girls. (2) in the defendant's position, there is always a son, not necessarily a daughter. If a girl is on the defendant's side, it means that she is in a coalition with a boy. Based on these two facts, three categories were obtained, namely: (a) only girls versus boys only; (b) girls only versus a coalition of boys and girls; and (c) a coalition of girls and boys versus boys only. Cases that fall into category (a) are 6 cases, category (b) are 4 cases, and category (c) are 2 cases. The cases are identified in the table below. Most women in Indonesia seek justice in

Religious Courts. Therefore, it is essential to apply gender perspectives and perspectives in religious courts involving women in conflict with the law. (Wahyudi, 1967) The phenomenon of women as the main actors in inheritance cases shows that women become aware of their rights to inherit. This aligns with the ideals of the renewal of inheritance law proposed by Hazairin and Munawir Sjadzali (Permana, 2018).

The majority of land claims based on inheritance disputes are brought by parties from the lineage of daughters. Nonetheless, these decisions are by no means made with gender narrative in mind. Indeed, in the outcomes (*amar putusan*), the women (the daughters' descendants) benefit from the redistribution of inheritance. However, this redistribution is not based on awareness of women's rights particularly but because the previous division has not been carried out legally according to the valid legal procedure. It seems to benefit women because Article 185 of The Compilation and other Articles and references from various scripture texts quoted do not reject women's rights. The basics and sources of law quoted by the judges adhere to the patrilineal principle. Nevertheless, this principle does not completely put equal share for men and women.

As for this reference diversity, theoretically, it cannot be said to mainstream women's interests, but practically these norms recognize the existence of women's rights that must be guaranteed. The legal pluralism living in the local context does not supportively drive the judge to positively mainstream women rights. We argue that women's inheritance practices are not determined according to the new trend of gender mainstreaming where a new Islamic worldview exists, but rather are the complex and intertwined combination of legal sources pointing to the imbalance of portion between men and women. This condition is not far different from what is faced in other Muslim countries, for instance, Turkey (Toktas & O'Neil 2015); (Yasun 2018). As a result, the legal reasoning process of judges in the Religious Courts on the inheritance cases is not as dynamic as described by Irianto (Irianto, 2019).

## Conclusion

The competence of the religious court in land disputes is fundamentally the implementation of its authority in the field of inheritance. After issuing Law no. 3 of 2006 concerning Amendments to Law no. 7 of 1989, the option to file inheritance cases in two courts

no longer exists. The existence of Law no. 3 of 2006 confirms that the case of inheritance of Indonesian Muslims is the absolute authority of the religious court. That means, if there is an inheritance land dispute, Muslims can only submit their case to the Religious Court. Since then, the religious courts have experienced expansion and affirmation of authority. This expansion and affirmation of authority allow religious courts to handle more land dispute cases than before, especially cases based on inheritance conflicts. Land conflicts in Selong Religious Court are related to several things, namely (a) conflicts over joint property, which shows that in the inheritance of the old tradition, there is no distinction between inheritance and joint property; (b) related to the change of position of inheriting, which shows that in the old tradition, the successor heir was not known so that inheritance practices often ignored the rights of the successor heir; (c) concerning mandatory wills, it is shown that in society there are different understandings of the rights of adopted children to inherit through mandatory wills; and (d) relating to the granting of assets before the death of the testator, it shows that the community has a habit of dividing assets while the heir is still alive and this method of distribution is detrimental to female heirs.

In general, the factors that encourage land disputes in PA Selong are: (1) the distribution of land has not been carried out under the legal provisions applied within the Religious Courts; (2) the distribution of assets while the *muwāriṭh* alive frequently discriminates some other heirs, especially for daughters and their descendants. In resolving these cases, Selong religious court judges base their legal considerations primarily on the Compilation of Islamic Law and the Verses of the Qur'an. In addition to these two primary sources, the judges also minorly referred to hadith, *fiqh* rules, and the opinions of scholars. The judge's legal considerations quoting the verses of the Qur'an, *hadīth*, *fiqh* rules, or the opinions of scholars are not followed by an in-depth explanation of the interpretation or understanding of the source. These sources seem to be justifying or supporting the judge's opinion.

Theoretically, the reference to various materials and sources of law is not prohibited under the procedural law of the Religious Courts. But the concern is that this multi-layered referral does not strengthen the judge's legal reasoning considerably because, in decisions, the judges do not use deductive reasoning but rather inductive. This means that, basically, fact



by fact determines whether a claim or defence is true/false or win/lose. Quotations from scriptures or interpretations of scriptures only seem to be the secondary and only function to reflect the impression of Islam but in a lightweight sense. Practically speaking, in this context, it is not true to say that the use of religious texts contributes positively to the share of women or men because, in fact, by utterly referring to The Compilation, it is sufficient for judges to justify the respective parts. However, a judge's decision should not be seen in partial. As a whole, it means that decisions with complex references from scripture must have an impact on litigants who continue to set religious norms as a special standard associated with sacred meanings. This means that the reference to the religious text in a Religious Court as a basis for a judge's legal decision is more a symbol of Islamic identity devoid of strong legal meaning.

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**Lego Karjoko<sup>1</sup>, Abdul Kadir Jaelani<sup>2</sup>, Hilaire Tegnan<sup>3</sup>, Henning Glaser<sup>4</sup>, Muhammad Jihadul Hayat<sup>5</sup>**

<sup>1,2</sup>Faculty of Law, Universitas Sebelas Maret, Indonesia

<sup>3</sup>William and Marry Law School, USA

<sup>4</sup>Faculty of Law, Thammasat University, Thailand

<sup>5</sup>Faculty of Sharia and Law, UIN Sunan Kalijaga, Indonesia

E-mail: <sup>1</sup>legokarjoko@staff.uns.ac.id, <sup>2</sup>jaelaniabdulkadir@staff.uns.ac.id, <sup>3</sup>tegnan1@yahoo.fr,

<sup>4</sup>glasercontact@cpg-online.de, <sup>5</sup>mjhayat27@gmail.com